

Cause No. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT §  
FAIRNESS COALITION, et al., §  
§  
vs. §  
§  
MICHAEL WILLIAMS, et al. §  
§  
OF TRAVIS COUNTY, TEXAS  
*Consolidated Case:* §  
§  
MARIO FLORES, et al., §  
§  
vs. §  
§  
MICHAEL WILLIAMS, et al. §  
200TH JUDICIAL DISTRICT

**CHARTER SCHOOL PLAINTIFFS' REPLY TO DEFENDANTS' SECOND AMENDED  
RESPONSE TO PLAINTIFFS' AND INTERVENORS' REQUESTS FOR ATTORNEYS'  
FEES AND OBJECTIONS TO DEFENDANTS' REQUEST FOR ATTORNEYS' FEES**

Mario Flores, individually and as next friend of Aidan Flores; Christopher Baerga, individually and as next friend of Abby Baerga; Dana Allen, individually as next friend of Teal Evelyn Allen; Jason and Sarah Christensen, individually and as next friends of their children Luke and Grace Christensen; Brooks Flemister, individually and as next friend of Ulric Flemister; and Texas Charter Schools Association (hereafter "Charter School Plaintiffs") file this Reply to Defendants' Second Amended Response to Plaintiffs' and Intervenor's Request for Attorneys' Fees ("State's Response" and "the State" when referring to parties), and Objections to Defendants' Fee Request, and respectfully request the Court to award the full amount of attorneys' fees requested by the Charter School Plaintiffs and deny the Defendants' request.

## I. INTRODUCTION

The Charter School Plaintiffs brought their claims seeking declarations under the Uniform Declaratory Judgment Act (“UDJA”) that the State’s school finance system violates article VII, section 1, and article I, section 3 of the Texas Constitution. First, the Charter School Plaintiffs sought a declaration that article VII, section 1 of the Texas Constitution, with respect to the public school finance system, applies equally to open-enrollment charter schools. *See* Charter School Plaintiffs’ First Amended Petition at ¶ 40. Second, the Charter School Plaintiffs sought a declaration that the system is not adequately funded and fails to suitably and efficiently provide the resources necessary for a general diffusion of knowledge, in violation of article VII, section 1 of the Texas Constitution. *See* Charter School Plaintiffs’ First Amended Petition at ¶ 36. Third, the Charter School Plaintiffs sought declarations that the system of school finance violates article I, sections 3, the equal protection provision of the Texas Constitution. *See* Charter School Plaintiffs’ First Amended Petition at ¶ 37. Fourth, the Charter School Plaintiffs seek declarations that the artificial limit on the number of charter schools violates article VII, section 1, of the Texas Constitution, in that it is arbitrary, and a deterrent to the constitutionally required efficiency in the public school system. *See* Charter School Plaintiffs’ First Amended Petition at ¶ 38.

The Court denied the Charter School Plaintiffs’ article I, section 3 Equal Protection claim regarding facility funding, and efficiency claim regarding the artificial cap on the number of charter schools. The Charter School Plaintiffs prevailed on their claim that article VII, section 1 of the Texas Constitution, with respect to the public school finance system, applies to open-enrollment charter schools. The Charter School Plaintiffs also prevailed on their claim that the system is not adequately funded and fails to suitably and efficiently provide the

resources necessary for a general diffusion of knowledge, in violation of article VII, section 1 of the Texas Constitution.

The Charter School Plaintiffs submitted attorneys fee requests, including affidavits and supporting documentation, on or before March 5, 2013, in accordance with the Court's deadline.

In the State's Second Amended Response to Plaintiffs' and Intervenor's Request for Attorneys' Fees filed March 21, 2013, the State argues (1) that the "redundant remedies" doctrine compels the Court to deny Plaintiffs' fee requests. (2) In the alternative, the State argues that the fee requests should be denied or reduced because the Plaintiffs' fee requests include time that the State views as unreasonable or not necessary to the litigation. Finally, the State argues (3) that equity and justice require that the State, as the prevailing party on some of the claims brought by the Charter School Plaintiffs, be reimbursed for its expenses.

For the reasons detailed below, these arguments fail, and equity and justice demand that the Charter School Plaintiffs be reimbursed for the full amount of their reasonable and necessary fee requests.

## II. ARGUMENT

### **A. The Texas Supreme Court and the Third Court of Appeals repeatedly have held that the UDJA is the appropriate vehicle for asserting constitutional challenges, and that attorneys' fees can be awarded to the challengers.**

The State first claims that the Plaintiffs should have brought their claims directly under the Texas Constitution and therefore are not entitled to an award of fees under the Uniform Declaratory Judgment Act (UDJA).<sup>1</sup> Prior litigation in this very subject area has determined otherwise.

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<sup>1</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011

In the first Texas school finance case, *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391, 392, 398 (Tex. 1989) (“*Edgewood I*”), the Texas Supreme Court upheld the award of attorneys’ fees to plaintiffs challenging the constitutionality of the State’s school finance system under article VII, section 1 through a declaratory judgment action. In the most recent school finance case prior to the subject case, *Neeley v. West Orange-Cove Independent School District*, 228 S.W.3d 864 (Tex. App.—Austin 2007, pet. denied), the Third Court of Appeals upheld this Court’s award of attorneys’ fees to plaintiffs in their partially successful challenge to the constitutionality of the State’s school finance system under article VIII, section 1-e, through a declaratory judgment action.<sup>2</sup>

**The “Redundant Remedies” Doctrine is  
Not Applicable to the Plaintiffs’ Fee Requests**

Quite contrary to the State’s contentions, the Third Court of Appeals has concluded both that the UDJA is an appropriate vehicle for challenging the constitutionality of statutes, and that attorneys’ fees can be awarded to the challengers under the UDJA. *See, e.g., Local Neon Co. v. Strayhorn*, No. 03-04-00261-CV, 2005 WL 1412171, at \*8 (Tex. App.—Austin, June 16, 2005, no pet.) (mem. op.) (finding that plaintiffs should be allowed to proceed with challenge to constitutionality of various tax code statutes and rules through a declaratory judgment action, and that plaintiffs could seek attorneys’ fees in connection with claims); *State v. Anderson Courier Serv.*, 222 S.W.3d 62, 66-67 (Tex. App.—Austin 2005, pet. filed) (in successful declaratory judgment action challenging the constitutionality of statute, plaintiffs could have obtained attorneys’ fees had they not waived their request for fees); *Hays Cnty. v. Hays Cnty. Water Planning P’ship*, 106 S.W.3d 349, 362-63 (Tex. App.—Austin 2003, no pet.)

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<sup>2</sup> The Austin Court of Appeals did not address the question of whether the West Orange-Cove Plaintiffs’ request for declaratory relief under the UDJA was redundant, because it held that the State had waived this argument by not raising it in its primary appeal, but only on remand for consideration of attorneys’ fees. 228 S.W.3d at 867-68.

(affirming declaration that commissioners' court violated article V, section 18 of Texas Constitution and affirming trial court's award of attorneys' fees); *Bullock v. Regular Veterans Ass'n of U.S. Post No. 76*, 806 S.W.2d 311, 316 (Tex. App.—Austin 1991, no writ) (affirming declaration that Bingo Enabling Act was unconstitutional and trial court's award of attorneys' fees); *see also Democracy Coal. v. City of Austin*, 141 S.W.3d at 282.

And, the appellate courts have consistently concluded that the UDJA may be utilized for constitutional challenges, even where the constitutional provision being invoked, as alleged here, is self-executing and provides for an independent cause of action. *See City of Arlington v. Randall*, 301 S.W.3d 896, 908 (Tex. App.—Ft. Worth 2009, pet. denied) (“A claimant seeking a declaratory action *must already have a cause of action* at common law or *under some* statutory or *constitutional provision.*”); *Democracy Coal.*, 141 S.W.3d at 297 (permitting declaratory judgment action despite the fact that Texas constitutional guarantees of freedom of speech and expression have been held to constitute an independent legal basis for a cause of action); *Frasier v. Yanes*, 9 S.W.3d 422, 426 (Tex. App.—Austin 1999, no pet.) (holding that plaintiffs could utilize declaratory relief to enforce their rights under article III, section 52e of the Texas Constitution, a self-executing provision that provided independent cause of action).

The State's reliance on *MBM Financial Corporation v. Woodlands Operating Company*, 292 S.W.3d 660 (Tex. 2009) is misplaced. As noted in the State's brief, *MBM* involved breach of contract and common-law fraud claims. *Id.* at 670; State's Response at 6. But the State fails to note that each of the claims, cited as authorities, come with its own set of standards for the award of attorneys' fees. *See MBM Fin.*, 292 S.W.3d at 670. Specifically, the Supreme Court noted that, “when a claim for declaratory relief is merely tacked onto a standard suit based on a matured breach of contract, allowing fees under Chapter 37 [TEX. CIV. PRAC. &

REM. CODE] would frustrate the limits Chapter 38 [TEX. CIV. PRAC. & REM. CODE] imposes on such fee recoveries.” *Id.* *MBM Financial* merely applies the recognized and codified rule of statutory construction, that specific statutory provisions prevail over general ones. *Id.* at 670 and n.56 (citing TEX. GOV’T CODE ANN. § 311.026(b) and *Strong v. Garrett*, 224 S.W.2d 471, 475 (1949)). Thus, *MBM Financial* is applied where a specific statute governs the claims. *See, e.g., Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 301 (Tex. 2011) (“[In *MBM Financial* w]e further explained that allowing fees under the [U]DJA would frustrate the limits imposed by the specific provisions governing attorney’s fees for breach of contract claims. The same reasoning applies here: allowing Jackson to recover attorneys’ fees under the DJA when he cannot meet the requirements for their recovery under the TPIA would frustrate the limits established by the TPIA.”); *Underwriters Lloyds of London v. Harris*, 319 S.W.3d 863, 865 (Tex. App.—Eastland 2010, no pet.) (“Because specific statutory provisions prevail over general provisions in statutory construction and the declaratory judgment claim was redundant of the breach of contract claim, the plaintiff’s right to recover attorney’s fees was defined by contract law. Because the plaintiff could not recover its attorney’s fees under section 38.001, it could not recover them under section 37.009.”); *cf. Texas Dept. of Pub. Safety v. Alexander*, 300 S.W.3d 62, 79 (Tex. App.—Austin 2009, pet. denied) (UDJA claim cannot be used to circumvent specific jurisdictional requirements of the Texas Commission on Human Rights Act).

The State’s reliance on *University of Texas at Austin v. Ables*, 914 S.W.2d 712 (Tex. App.—Austin 1996, no writ) is likewise misplaced. *Ables*, a standard age and sex discrimination claim involved no claim directly under the Texas Constitution. *Id.* at 714, 715 n.4. Only after a verdict for the plaintiffs, did the trial court enter a supplemental declaration

that the University had deprived one plaintiff of due process of law in violation of article I, section 19 of the Texas Constitution, and awarded all plaintiffs their attorneys' fees. *Id.* at 714 and n.2. Thus, because the case involved straightforward employment discrimination claims, and not a direct challenge to the constitutionality of statutes, the Third Court properly found, in dicta, that the award of fees was improper under the UDJA, *Id.* at 717. *Ables* has no bearing on the award of attorneys' fees in this case.

And neither do the other cases cited by the State, which prohibit a plaintiff from "gaming the system" by seeking fees through the UDJA for claims that otherwise would not support an award of attorneys' fees. *See, e.g., City of Houston v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (plaintiffs brought a claim for inverse condemnation and then *three years later*, amended their pleadings to add an identical declaratory relief claim and a request for fees).

Here, it is clear that the Charter School Plaintiffs had no such intent to "game the system." The Plaintiffs do not merely seek declarations of specific facts that would establish other statutory or common-law claims, *see MBM Fin.*, 292 S.W.3d at 670 (plaintiffs sought declarations regarding specific facts relevant to breach of contract claim) and *AVE, Inc. v. Comal Cnty.*, No. 03-05-00183-CV, 2008 WL 2065857 at \*5-6 (Tex. App.—Austin May 14, 2008, no pet.) (mem. op.) (UDJA counterclaim redundant and attorneys' fees not allowed *because* county sought declaration *only* that plaintiff's actions violated local order (an action governed by TEX. LOCAL GOV'T CODE ANN. § 243.010) and *did not* seek declaration that the ordinance was constitutional), nor do they seek declarations solely about how the statute impacts them specifically. *See Kuntz v. Khan*, No. 03-10-00160-CV, 2011 WL 182882 (Tex. App.—Austin Jan. 21, 2011, no pet.) (plaintiff not entitled to fees under UDJA because,

“[a]lthough she presents several constitutional arguments as to how the Department’s actions affect her individually, she makes no broad constitutional challenge to the entire statutory scheme”). Rather, the Charter School Plaintiffs seek a declaration that the statutory structure of the school finance system is unconstitutional, consistent with the historical precedent of how school finance has been previously litigated<sup>3</sup> and within the purpose and intent of the UDJA.<sup>4</sup> See TEX. CIV. PRAC. & REM. CODE. ANN. § 37.004; see also *Democracy Coal*, 141 S.W.3d at 296; *Lindsey*, 850 S.W.2d at 188.

The State’s argument that the Charter School Plaintiffs utilized the UDJA in an attempt to “game the system” in order to obtain attorneys’ fees is unpersuasive and incorrect.

**B. The Charter School Plaintiffs request reimbursement of attorneys’ fees in amounts that are reasonable, necessary, and just.**

The State incorrectly argues that the Charter School Plaintiffs are not “prevailing parties” under the Court’s ruling. See State’s Second Amended Response to Plaintiffs’ and Intervenor’s Requests for Attorney’s Fees at page 13. The Charter School Plaintiffs, who for the first time in over 22 years of Texas school finance litigation, sought and were rewarded with constitutional protections previously afforded to only their sister school districts, did, in fact, prevail on their claim that article VII, section 1 of the Texas Constitution, with respect to the public school finance system, applies to open-enrollment charter schools. The Charter School Plaintiffs also prevailed on their claim that the system is not adequately funded and fails

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<sup>3</sup> See, e.g., *Edgewood I*, 777 S.W.2d at 392, 398. Other litigants have brought challenges under article VIII, section 1-e through the UDJA as well. See *Texas Mun. League Intergovernmental Risk Pool v. Texas Workers’ Comp. Comm’n*, 74 S.W.3d 377, 387-88 (Tex. 2002) (a plaintiff insurance fund utilized the UDJA to challenge various Labor Code statutes as being in violation of article VIII, section 1-e).

<sup>4</sup> In fact, the practice of using the UDJA to challenge the facial validity of statutes is so central to the Act’s purpose that the Texas Supreme Court recently needed to respond to an (erroneous) argument by the Texas Lottery Commission that it “does not waive immunity because it applies only to suits involving constitutional invalidation and not to those involving statutory interpretation.” *Texas Lottery Com’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634 (Tex. 2010).



to suitably and efficiently provide the resources necessary for a general diffusion of knowledge, in violation of article VII, section 1 of the Texas Constitution. And while the Court has not, at this time, issued a clarifying Final Judgment, it is believed that the Charter School parent/plaintiffs will be treated as equals to the parent/plaintiffs from the school district Plaintiffs and offered judgment on their claim that the current finance system is inefficient in violation of article VII, section 1 of the Texas Constitution.

As such, the trial court may award Attorneys' Fees to the Charter School Plaintiffs in an amount that is reasonable, necessary and just. *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998). A party need not have "substantially prevailed" to be entitled to an award of attorneys' fees under the UDJA. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). Relying on its faulty premise that the Charter School Plaintiffs were not prevailing parties, the State asks that it and the Charter School Plaintiffs be treated alike, but cites no authority for such proposal, nor offer any reason why doing so would be equitable or just. The State argues, in the alternative, that even if attorneys' fees are permitted in this case under the UDJA, the Court should reduce the fees sought by the Charter School Plaintiffs to account for unreasonable, unnecessary, or unrecoverable time worked on the case. However, the Charter School Plaintiffs' extremely reasonable, and even miserly request is amply supported by documentation already reflecting reduced hourly rates and reduced billing hours, which reductions more than address any potential for redundant or excess billings. *See* Affidavit of Robert A. Schulman. Moreover, the State submits no competing evidence challenging the reasonableness of the Charter School Plaintiffs' fee requests. Instead, the State bolsters the reasonableness of the Charter School Plaintiffs' fee request through its own fee request, wherein the State seeks to recover almost \$2.3 million for work performed by

twenty-five different lawyers and ten legal assistants, more than four times the fees sought by the Charter School Plaintiffs for the same trial.

Whether it is equitable and just to award the Charter School Plaintiffs' reasonable and necessary fees "is a matter committed to the trial court's sound discretion." *Ridge Oil Co., Inc. v. Guinn Investments*, 148 S.W.3d 143, 161, 162 (Tex. 2004). The following addresses the primary objections raised by the State against the Charter School Plaintiffs' fee requests, as well objections raised by the State to the "Plaintiffs" fee request in general where applicability to the Charter School Plaintiffs is unclear.

**1. It was both reasonable and necessary for the Charter School Plaintiffs to have more than one attorney participate at trial and other important events.**

The Charter School Plaintiffs, according to the State, should recover attorney fees for only a single attorney each day of the trial, and only seven hours a day for that lone attorney. State's Response at 11. Such a limitation is neither equitable nor just, much less supported by authority.

Foremost, an examination of Exhibit M (the invoices) to the Affidavit of Robert A. Schulman submitted in support of the Charter School Plaintiffs' request for attorneys' fees, demonstrates that with few exceptions, and the week prior to, and the three days of the presentation of the Charter School Plaintiffs' case, the Charter School Plaintiffs submitted billings for recovery of fees for one trial attorney only. While the Charter School Plaintiffs complained of the same basic unconstitutionality of the finance system as did the school district plaintiffs, Charter School Plaintiffs' counsel was, nonetheless, required to monitor each day of trial testimony and examine both the school district and State witnesses when necessary to explain the distinction and differences of the impact of the unconstitutional finance system on

the charter schools. Given the complexity of the issues and number of witnesses and exhibits in the case, it was therefore reasonable for a lead attorney to be, from time to time, supported by another attorney when presenting or cross-examining witnesses.

Given that the State's fee request is \$2.3 million, for 12,077 hours of work, the State must be seeking to recover for the work of more than one attorney at trial each day. The State certainly had multiple attorneys in court during the trial, and its fee request is so lacking in details that is impossible to determine how many attorneys, or for how many hours work each day, it is seeking reimbursement for trial work. The State's seven-hour limit is divorced from the reality that, although the time spent in the courtroom between convening and adjournment may have in fact been seven hours or less on most trial days, the work day of the attorneys started earlier, and ended later.

**2. It is reasonable to allow for recovery of travel time in a case of this nature.**

Whether to reduce costs for travel by attorneys, and if so by how much, is within the sound discretion of the court. *See, e.g., Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993) (abuse of discretion standard applied). Every school finance case has been tried in Travis County for good reason—it is centrally located, the home of the primary offices of the State and its lawyers, and its courts are well prepared to handle the legislative and constitutional issues central to school finance litigation. During pre-trial, the State's position was that depositions should take place in Austin, even for witnesses not from Austin, and absent agreement otherwise the State generally noticed depositions for Travis County, amply demonstrating that litigating in Travis County, and not in locations scattered all over Texas, was in the State's interest. Having benefitted from venue in Travis County, it is neither just, nor equitable, for the State to now complain that the Charter School Plaintiffs' fee request would be

reduced if the lawsuit had not been consolidated with ongoing Travis County venue for the other school finance litigation.

**3. The Charter School Plaintiffs brought a novel case, and its complexity, breadth, and unique aspects support the award of fee requests.**

While the State suggests that the experience of some ISD Plaintiff attorneys in past school finance litigation somehow militates against the requested fees, without explaining the manner or amount by which the fee requests should be impacted, the State has not contradicted the Charter School Plaintiffs' assertion that their claims are new, and have not been previously litigated. In its own fee request the State specifically addressed the newness and uniqueness of the Charter School Plaintiffs' claims, stating:

Although this case is similar in many regards to previous school finance litigation, it is also unique in that the facts and circumstances differ from those in previous challenges to the constitutionality of the school finance system because legislative policy changes made since the earlier school finance cases. The parties advanced many new legal and factual theories, and this case dealt with unique claims concerning inefficiencies and inequities related to charter schools in the State. As a result, Counsel spent considerable time and resources adequately researching and responding to Plaintiffs and Intervenors' claims.

Affidavit of Mary T. Henderson at ¶ 9.

The Charter School Plaintiffs brought a case that was different from any of the prior school finance cases. Moreover, the Charter School Plaintiffs had filed their lawsuit independent of the instant suit and were invited by the State and this Court to consolidate their claims on August 17, 2012, some ten months after the first school district plaintiffs filed their petition. The result was the necessity for the Charter School Plaintiffs to compress into a 60-day period, document reviews, discovery and other pretrial preparations, which the other parties had up to a year to prepare.

The trial, which featured 45 days in court, over a three-month period, approximately 80 live witnesses, more than 5,500 admitted exhibits, was completed in slightly over six months from the filing of the Charter School Plaintiffs' lawsuit. As the Court stated on February 4, 2013, "I don't believe that there's ever been a more expeditious trial of a school finance case anywhere in the United States than what has occurred here." 2/4 Tr. at 89. For the Charter School Plaintiffs to meet the expedited schedule brought on by their consolidation in an ongoing action, required extraordinary efforts from their lawyers and support staff.

**4. The State's specific objections to the Charter School Plaintiffs' fee requests are not reasonable or meritorious.**

The Charter School Plaintiffs have already reduced their requested fees by fifteen percent (15%) to account for any fees related to claims on which they did not prevail, or which are otherwise unrecoverable. Affidavit of Robert A. Schulman at ¶ 12. Although, compared to some of the other Plaintiffs, it raised very few objections, the State did object to three categories of time expended by the Charter School Plaintiffs. The first, under the laconic heading "Not Billable" does not adequately inform either the Charter School Plaintiffs, or the Court, what the State's complaint is. For example, the entries on October 22, 24, 25 and 26, and for November 1 and 6, for the Charter School Plaintiffs' lead counsel, Robert A. Schulman, for attending trial, are objected to as "Not Billable." The State's second category of objections is "Duplicative Work," which does not inform either the Charter School Plaintiffs, or the Court, how that particular entry is "duplicative."

The State's third category of objections is "Travel." An examination of the invoices (Exhibit M) to the Affidavit of Robert A. Schulman submitted in support of the Charter School Plaintiffs' request for attorneys fees, will demonstrate that, even before the entire fee request was discounted by fifteen percent (15%), many of the travel entries had already been discounted by

one-half. The Charter School Plaintiffs' remaining attorneys' fees related to travel were reasonable and necessary. This lawsuit was necessarily filed in Austin, as discussed above, and the Charter School Plaintiffs' lead counsel resides outside of Austin. His home office is in San Antonio. His law firm leased accommodations in Austin during the pendency of the trial in order to limit travel time to the weekend. But in any event, this case involved clients and witnesses from across the State, and therefore some travel was a necessary expense of the litigation. It should also be noted that the Charter School Plaintiffs' attorney, who appeared most frequently apart from lead counsel, was Leonard Schwartz, who resides in Austin.

The Uniform Declaratory Judgment Act expressly permits recovery of reasonable and necessary costs and attorneys' fees. TEX. CIV. PRAC. & REM. CODE § 37.009. The attorneys' fees in question are reasonable in amount and were necessarily incurred by the attorneys in prosecuting the UDJA action. Thus, the costs are recoverable, and the Court should find that all of the fees requested by the Charter School Plaintiffs are both reasonable and necessary.

**C. It would be equitable and just for the Charter School Plaintiffs to be awarded the full amount of their attorneys' fees and for the State's request to be denied.**

The Charter School Plaintiffs prevailed on their claims, joining public school districts, who have, for the fourth time in twenty-five years—and the second in the last decade—prevailed on a claim that the school finance system violates one or more sections of the Texas Constitution. *See generally, Edgewood I*, 777 S.W.2d 391; *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *WOC II*, 176 S.W.3d 746. Even the evidence from the State's own witnesses showed that the State has not even ascertained the cost of meeting its rising standards, *see* 1/8 Tr. at 69-71, 123-24, 187, 192-95; 1/9 Tr. at 19-20, 174-77; 12/10 Tr. at 126-27; 12/11 Tr. at 163-65, 175; 1/7 Tr. at 154-56; 1/10 Tr. at 81, 185-86;

RR17:37, much less provided its public schools with the wherewithal to meet those standards. For the past 15 years, the State has not complied with its constitutional and statutory duty to determine the costs of the formulas, and has rarely changed the formulas even when it has determined that it should. *See* RR10:154-55 (referencing Ex. 6352 at 9); Ex. 1328 at 6-12. What the State did instead is cut education funding by over \$5 billion, and slash per-student spending to fall \$800 below 2003-04 levels and merely adjust for inflation, all while drastically raising standards. *See* Ex. 6322, Moak Report, at 47-48; RR6:200-02 (referencing Ex. 6349 at 43).

The Charter School Plaintiffs acknowledge that the prevailing party is not automatically entitled, as a matter of law, to attorneys' fees. But the evidence brought forth at trial, and the history of school finance cases, shows the same behavior. The State refuses to calculate the cost of meeting its own standards, then fails to fund that cost, until ordered by the courts to meet its clearly-established constitutional obligations. Given that pattern, the awarding of fees to the Charter School Plaintiffs is more than equitable and just.

For the same reasons, the State's request for attorneys' fees should be denied. It would be inequitable and unjust to take resources from the very charter schools which do not have enough resources to provide a general diffusion of knowledge to their school children, and which have no power to impose local taxes, or from the parent of the students who attend charter schools, to pay the fees of the State.

**D. The State Failed to Establish That its Request for Attorneys' Fees is Reasonable and Necessary.**

The Court must make a factual determination regarding the reasonableness and necessity of States' fee request. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The State's request for attorneys' fees includes only lump sum amounts for its attorneys. *See generally*, Affidavit of Mary T. Henderson. Because the State includes no descriptions,

there is thus no way for the Charter School Plaintiffs to make itemized objections in the same manner as the State has done in response to the Charter School Plaintiffs' request, and it is impossible for the Court to discern what time was duplicative or unnecessary.

The State has also failed to establish how or why reimbursement of its fees is equitable and just. *See Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.) (holding that court may consider relative success of parties when determining fees). To the extent that the State asserts that it is entitled to reimbursement for prevailing in part against the Charter School Plaintiffs, it failed to establish that it segregated its fees request appropriately. *See generally*, Affidavit of Mary T. Henderson; *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006) (holding that when a party is entitled to attorneys' fees from the adverse party on one cause of action but not another, the party claiming fees must segregate the recoverable fees). Because the segregation test is focused on which legal services were necessary for each claim, it is impossible, given the generality of the State's fee request, to make a proper evaluation based on the State's fee affidavit. *See Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007). The Charter School Plaintiffs went to considerable effort to make sure that the billing records that they submitted were sufficient to allow the State to make reasonably specific objections to them. The State did pick over those billing records, and made three pages of objections to them, while giving the Charter School Plaintiffs nothing specific enough in return to determine whether there exists a basis for objection. For that reason alone the State should be denied attorneys' fees under *Tony Gullo Motors I*.

To show the reasonableness on an hourly rate requested for any particular attorney, a requestor should demonstrate the experience, reputation, and ability of the attorney performing the services. Tex. Disc. R. Prof'l Conduct 1.04(b)(7); *Arthur Andersen & Co. v. Perry Equip.*



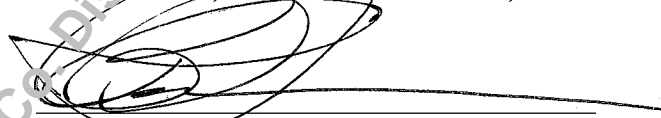
*Corp.*, 945 S.W.2d 812, 818-19 (Tex. 1997). The State provided that information for just three of the twenty-five attorneys for whom it is claiming fees. *See* Affidavit of Mary T. Henderson. Finally, the State provides no explanation of the other charges shown in Exhibit A to its Notice of Affidavit Regarding Attorneys' Fees and Costs, nor how it relates to the rates listed in its affidavit. *See* Affidavit of Mary T. Henderson.

### **CONCLUSION**

For all those reasons, the Charter School Plaintiffs respectfully request that the Court grant the full amount of attorneys' fees requested by the Charter School Plaintiffs and deny the State's request for attorneys' fees.

Respectfully submitted,

**SCHULMAN, LOPEZ & HOFFER, L.L.P.**

A handwritten signature in black ink, appearing to read 'Robert A. Schulman', is written over a horizontal line.

**Robert A. Schulman**

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## CERTIFICATE OF SERVICE

The undersigned certifies that on April 16, 2013, a true and correct copy of Plaintiffs' Notice of Filing was served upon the following counsel of record *via* e-mail pursuant to the agreement of the parties and in compliance with the Texas Rules of Civil Procedure and the Texas Local Rules:

Shelley N. Dahlberg, Nicole Bunker-Henderson and Robin Pearson, Texas Attorney General's Office, P. O. Box 12548, Capitol Station, Austin, Texas 78711; **Attorneys for State Defendants;**

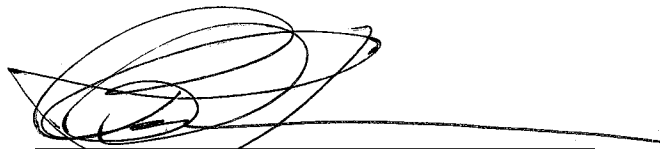
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